92-1398

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN RE: GREENE, RICHARD D. & DONNA J.
husband and wife – Debtors

ROSS RICHARDSON, Chapter 7 Panel Trustee,

Petitioner,

vs.

MT. ADAMS FURNITURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

Does Indian tribal immunity preclude a valid claim by a Chapter 7 Bankruptcy Trustee against a tribal business entity, when the basis for the claim arose out of commercial activity which occurred off of the Indian reservation, and involved non-Indians?

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vs.

MT. ADAMS FURNITURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ross Richardson, Chapter 7 Trustee, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 25, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is in Appendix A hereto, infra, page 1. The judgment of the United States District Court for the District of Montana is printed in Appendix B hereto, infra, page 26. The judgment of the United States Bankruptcy Court for the District of Montana is printed in Appendix C hereto, infra, page 28.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page 1) was entered on November 25, 1992. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does Indian tribal immunity preclude a valid claim by a Chapter 7 Bankruptcy Trustee against a tribal business entity, when the basis for the claim arose out of commercial activity which occurred off of the Indian reservation, and involved non-Indians?

STATUTES INVOLVED

28 U.S.C. Section 157, 28 U.S.C. Section 1334, and 11 U.S.C. Section 106 are set forth in pertinent part in Appendix D, page 32, attached hereto.

STATEMENT OF CASE

A. *Proceedings below:*

This was a case originally brought as an adversary proceeding by Ross Richardson, a Chapter 7 Panel Trustee for the District of Montana. Richard D. and Donna J. Greene filed a petition for relief under Chapter 7 of the Bankruptcy Code on April 26, 1989, in the United States Bankruptcy Court for the District of Montana under Cause No. 89-20544. In administering the Chapter 7 estate, the Trustee believed that a preferential transfer (11 U.S.C. Section 547) had occurred prior to the filing of the bankruptcy petition and commenced an Adversary Proceeding against Mt. Adams Furniture in the United States Bankruptcy Court for the District of Montana under Adversarial Cause No. 90/0023. It is undisputed that the preferential transfer occurred. The sole issue is whether Mt. Adams Furniture, a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Nation, enjoys sovereign immunity, rendering the Bankruptcy Court without jurisdiction to impose judgment against it in the amount of $8,779.00.

The United States Bankruptcy Court found that Mt. Adams was not entitled to sovereign immunity. The United States District Court affirmed the decision. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, finding that 11 U.S.C. Section 106(c) did not operate as a waiver of sovereign immunity.

The underlying claim of the trustee has been brought against a wholly-owned enterprise of the Yakima Nation which builds furniture and sells it from its plant in Wapato, Washington, located within the exterior boundaries of the Yakima Indian Reservation. The debtors operated their business, Custom Carpets, in Townsend, Montana, where the repossession took place. Townsend, Montana, is not located within the boundaries of the Yakima Indian Reservation, nor are the debtors members of the Yakima Tribe. There has been no contested issue of fact throughout these proceedings.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG FEDERAL COURTS

A. *The Parties.*

This case concerns the authority of a Chapter 7 Bankruptcy Trustee to recover goods repossessed by Mt. Adams Furniture from a Chapter 7 debtor. That a "preferential transfer" under 11 U.S.C. Section 547 occurred, is undisputed. Under the aforementioned section of the Bankruptcy Code, the Trustee is the only entity that can bring a "preferential transfer" action.

The Chapter 7 Trustee represents the bankruptcy estate and is empowered to sue on the estate's behalf. See 11 U.S.C. Section 323. His mandate is to collect and reduce to money the property of the estate, and thereafter distribute the money to creditors who file valid proofs of claim in accord with the Bankruptcy code. See 11 U.S.C. Sections 704 and 726.

This case is not one involving parties that are members of the Yakima Indian Nation. It does not deal with a contract between the Indian Nation and the Trustee. The transaction in question did not occur on the Indian Reservation. Simply stated, this is an action between a Chapter 7 Trustee for recovery of goods (or their value) removed by a business entity owned by the Yakima Indian Nation. The repossession took place in Townsend, Montana, on property not owned by the Indian Nation. Accordingly, important questions of federal law are presented which have not been, but should be, resolved by this Court.

B. *The United States Supreme Court Decisions.*

The Ninth Circuit Court reviewed decisions of the United States Supreme Court and found no case directly on point. Instead, it interpreted various decisions of the Supreme Court

to imply a basis for its decision. The following statements, which appear in the opinion delivered in this case in the Ninth Circuit Court of Appeals, indicate that this lack of direction caused problems for the Circuit Court:

> "As we analyze this *somewhat confusing area of Indian Tribal Jurisprudence*, . . ." (emphasis supplied)
>
> * * *
>
> There is language in Supreme Court cases, such as *Wheeler* and *Mescalero Apache Tribe v. Jones*, which raises some question about tribal authority, and perhaps immunity, *off the reservation*." (emphasis supplied)

Thereafter, it is submitted that the Court interpreted and distinguished these decisions in an erroneous manner, contrary to the implied rule already created by this Court. A review of the Ninth Circuit Court of Appeals' opinion reveals a thinly veiled request for this Court's review.

The Circuit Court indicated that it had no United States Supreme Court case on point with which to reach its conclusion in this case. Further, the Court felt that there was no Circuit Court decision to rely on in reaching its conclusion. As stated by Judge Rymer in the concurring opinion to the decision in question, which is attached hereto:

> I agree with my colleagues that the tribe's sovereign immunity bars this action under either theory argued by the parties—that the Bankruptcy Court's exclusive jurisdiction abrogates tribal sovereign immunity and that 11 U.S.C. Section 106(c) effects a waiver of that immunity. In framing the issues this way, however, both parties assume that the scope of tribal immunity was locked in at the time the treaty with the Yakima Nation was ratified and can only be changed by Congressional action; the immunity enjoyed by other sovereigns, however, is subject to evolution through the common law. As it has evolved, the immunity of a foreign state is limited to its

> public acts and does not extend to suits based on its commercial or private acts. *I write separately to note that we have never squarely addressed the question whether the law on sovereign immunity of an Indian nation is similarly developed. It is not an easy question to resolve, and I am not so persuaded as the majority appears to be that "the scope of tribal immunity has to be measured at the common law as it existed at some earlier time. . . ."* (emphasis supplied).

Thereafter, the concurring opinion expressed further reservations by reviewing federal common law changes in the doctrine of immunity. The concurring opinion noted that by enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. 94-582, 90 Stat. 2891 (1976), Congress adopted the "restrictive view" of sovereign immunity. The House of Representatives report on the FSIA stated that:

> the bill would codify the so-called "restrictive" principal of sovereign immunity *as presently recognized in international law*. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

House Report (Judiciary Committee) No. 94-1487 (Sept. 9, 1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 (emphasis in the original).

Judge Rymer's opinion also notes that common law sovereign immunity among the states has also evolved. Although tribal sovereign immunity is not precisely the same as international sovereign immunity, or sovereign immunity among the states, the common law sovereignty of Indian Nation tribes is not absolute. Further, she noted:

> Because that common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial

> actor to escape the legal consequences of its actions, *whether tribal immunity now extends to commercial activities is an important, complex, and unresolved question.* (emphasis supplied).

In a footnote, Judge Rymer also noted that:

> No other court has directly confronted this question, either. . . .

The footnote then went on to cite two federal court cases which touched on the commercial exception recognized in the FSIA and commercial transactions of an Indian tribe. In addition, the concurring opinion provided a list of state supreme court decisions which have addressed the commercial exception, but with ambiguous results. The opinion clearly reflects the thought of the Ninth Circuit Court of Appeals that there is a need for this Court to decide the matter.

In fact, when reviewed in their context, there appears to be more dicta in United States Supreme Court decisions supporting a denial of tribal immunity than affirming it. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 36 S.Ct. 2d 114, 93 L.Ed. 1267 (1973), this court stated:

> . . . but tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent expressed federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. (citations omitted).

In *U.S. v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303, (1978), we see this language:

> The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign

> powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication *as a necessary result of their dependent status*. (*Supra*), 435 U.S. at 323 (emphasis supplied).
>
> * * *
>
> . . . moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost *by virtue of their dependent status*. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . . . (*Supra*), 435 U.S. at 326 (emphasis supplied).

In Montana vs. United States, 450 U.S. 544, 546, 101 S.Ct. 1245, 67 L.Ed. 2d 493, (1981) this Court again observed:

> This court most recently reviewed the principals of inherent sovereignty in *United States v. Wheeler* (citations omitted). In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territories," (citations omitted), the Court upheld the power of the tribe to punish tribal members who violate tribal criminal laws. But the court was careful to note, that through their *original incorporation into the United States* as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. (citations omitted). The Court distinguished between those inherent powers retained by the tribes and those divested:
>
> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . ."
>
> * * *

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction *is necessarily* inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis in the original).

Interestingly, in *Mescalero Apache Tribe v. Jones* (*Supra*), the Court appeared to reach a decision that would be contrary to that reached by the Ninth Circuit in this case. In interpreting the Indian Reorganization Act of 1934 (48 Stat. 984), the Court stated that it would be unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of government". *Mescalero*, 411 U.S., at 153, 93 S.Ct. at 1273. The equitable basis for the doctrine of *Mescalero* exists here. The Supreme Court's recognition of the obligation of an enterprise to pay taxes upon its operations should also extend to its legal responsibilities under the Bankruptcy Code.

Almost as an exclamation point, the final paragraph in the footnote to Judge Rymer's concurring opinion points out the critical need for the United States Supreme Court to review this issue. It states:

> Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," (citations omitted), it has never directly considered the reach of tribal immunity in business ventures. Indeed, Justice White dissented from the denial from certiorari in *Padilla*, 490 U.S. at 1030, urging that the Court should have heard the case "to resolve the conflict among the state courts"; and Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity

extends to cases arising from a tribe's conduct of commercial activities off the reservation." (citations omitted).

C. *United States Circuit Court Decisions*

Although the Ninth Circuit Court could find no parallels to this issue, it appears that the Court of Appeals for the Eighth Circuit may have. It recognized that Courts have drawn distinctions between the actions of a government in its sovereign capacity and its operations in commercial transactions generally carried on by corporations organized by the government and invested in one of the sovereign's functions. In *North Dakota-Montana Wheat Growers Assoc. v. United States*, 66 F.2d 573 (8th Cir. 1933), the Court impliedly conceded that a government is not immune from suit where it organizes and operates such a business corporation.

In *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), it also appears that this important question has been resolved with an opposite result. The tribe asserted that the Federal Court had no jurisdiction to hear the matter because of a case then recently decided by the United States Supreme Court, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Although *Dry Creek* dealt in part with the issue of tribal court jurisdiction, (and the Ninth Circuit holds that the jurisdictional issue is not a deciding factor in this case), the opinion itself dealt with tribal immunity. In *Dry Creek*, the appellate Court held:

> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal affairs and when it concerns an issue of a non-Indian. *Id*, at 685.

The Court went on to note in reviewing the *Santa Clara* decision:

> . . . the limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled. *Id*, at 685.

The *Dry Creek* Court also looked at one aspect of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, (1978):

> This relates to the sovereignty holding by the Ninth Circuit. The Circuit had in substance held that the authority there in issue was presumed to be in the tribe unless Congress had acted. The majority in the Circuit opinion focused on whether Congress had taken away the sovereignty of the tribe as to the matter in issue. The Supreme Court reversed and turned the matter around. The Court said:
>
> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or Congressional enactment. As the Court of Appeals recognized, Indian Tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers *inconsistent with their status*." (emphasis in the original. *Dry Creek, (Supra)*, at 684."

Admittedly, the *Dry Creek* decision was based on an analysis that required protection of the rights of U.S. citizens from "unwarranted intrusions on their liberty". But the rationale in *Dry Creek* is the same as in this case.

All of the above-referenced Circuit Court decisions recognize in principle that tribal sovereign immunity is limited and not applicable to activities conducted off of Indian country.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG STATE COURTS

As indicated in the footnotes to the concurring opinion in the Ninth Circuit decision, various state courts have reached different resolutions of this issue. In fact, depending on the state, the same issue could be decided a number of different ways.

In *Atkinson v. Haldinen*, 569 P.2d 151, (Alaska 1977), a case stemming from an automobile accident on the Indian reservation, the Court held that the tribal immunity of the Indian nation was not waived since the acts alleged in the complaint related to a tribe's governmental function rather than it's corporate functions. However, the Court did note in a lengthy opinion that a number of other states have waived tribal immunity in certain instances.

An opposite result was reached in *Padella v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), where the Court reviewed the question as to whether state courts have jurisdiction over Indian tribes that have not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct. In reaching its decision, the Court noted that the "supreme law of the land" had not divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that had asserted sovereign immunity for its off-reservation conduct. It held that the business conducted by the tribe off of its reservation was not clothed with immunity.

Similarly, in *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989), where a business corporation owned by the tribe was sued for personal injuries, the Court held that the corporation was not entitled to assert the tribal immunity for its off-reservation commercial activities.

Finally, in *North Sea Products Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, (Wash. 1979), the court held that tribal immunity includes immunity from garnishment actions and immunity is not waived by the tribe's commercial activity. However, in a concurring opinion, one of the justice's noted that the present law is "unjust, unwise and unreasonable".

It is undisputed by the parties hereto that Indian tribes possess a degree of immunity from suit. It is further clear upon a review of the federal and state case law that the degree of immunity depends upon the locale. The tangled inequalities that exist throughout the country must be resolved by this Court. The simultaneous application of contradictory results in the courts below lead to anomalous results. This

Court should resolve the issue to establish a uniform approach to activities engaged in by an Indian nation off of Indian country. The Ninth Circuit opinion drains the concept enunciated in *Mescalero*, *Wheeler*, and *Montana*, of its meaning, and declares a blanket immunity to all Indian action, both on and off the reservation.

III. THE BANKRUPTCY CODE LIMITS THE SOVEREIGN IMMUNITY OF INDIAN NATIONS

In its discussion the Ninth Circuit Court has determined that the Bankruptcy Code does not waive tribal sovereign immunity. The applicable section of the Code, 11 U.S.C. Section 106, is printed in Appendix D hereto, infra, page 32. It is the trustee's position that the Code does apply because of the "dependent status" of the Indian nation. This Court has already made clear that a general statute which by its terms applies to all persons includes Indians and their property interests. *F.P.C. v. Tuscarora*, 362 U.S. 99, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985). The Bankruptcy Code is a general statute, which does apply to Indians.[1]

---

[1] There are, however, three exceptions to this general principle as outlined by the case of *U.S. Department of Labor v. OSHRC*, 935 F. 2d 182, 184 (9th Cir. 1991):

> A federal statute of general applicability that is silent on the issue of applicability of Indian tribes will not apply to them if:
>
> (1) The law touches "exclusive rights of self governance in purely intramural matters";
>
> (2) The application of the law to the tribe would "abrogate rights guaranteed by Indian treaties";
>
> (3) There is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on the reservations . . .

(continued on next page)

Federal Courts have applied the Bankruptcy Code to tribes and their corporations. See *Lower Brule Construction Co. v. Sheesley Plumbing & Heating Co. et al.*, 84 B.R. 638 (D.S.D. 1988); *In Re Adams*, 133 B.R. 191 (Bktcy. W.D. Mich. 1991); *In Re Shape*, 25 B.R. 356 (Bktcy. D. Mont. 1982); and *In Re Sandmar Corp.*, 12 B.R. 910 (Bktcy. D.N.M. 1981).

The Trustee believes that bankruptcy issues are issues of overriding national interest of the federal government and that the Federal Courts have sole and exclusive jurisdiction over the issue of turnover of the property of the estate. Because of the dependent status of the tribe, the immunity of the Indian tribe does not apply here. See, for example, *In Re Sandmar*, 12 B.R. 910, 914 (Bktcy D.N.M. 1981) and *In Re Shape*, 25 B.R. 356, 358 (Bktcy D. Mont. 1982).

At the present time, Indians can file for Bankruptcy and enjoy the benefits and protections of that legislation. They should also be required to bear the burdens.

(continued from previous page)

The first exception does not apply in this case. The turnover of the property of the bankruptcy estate does not touch "exclusive rights of self-governance in purely intramural matters". A bankruptcy trustee is seeking funds to pay creditors. Tribal self-government is not impacted. See *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F. 2d 683, 685 (9th Cir. 1991) where the Court decided that ERISA applied to the tribal mill. ERISA obviously could have significant impact upon how a tribe treats its employees. A trustee seeking funds from a tribal enterprise holding funds belonging to the estate is certainly far removed from such a scenario.

The second exception does not apply in this case since it involves no "rights guaranteed by Indian Treaties".

Finally, the Trustee is not aware of, nor is the tribal business asserting, any legislative history that would exclude Indian tribes from the application of the Bankruptcy Code. A plain reading of the Code indicates that no theory exempts Mt. Adams Furniture from the applicability of the Bankruptcy Code.

IV. THE INEQUITIES NOW FOUND IN THE LAW PROVIDE FURTHER *REASON FOR REQUIRING* A LIMITING OF INDIAN SOVEREIGN IMMUNITY

The foundation of the Ninth Circuit's opinion is contained in the following citation:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . These Acts reflect Congress' desire to promote the "*goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development . . . .*" Under these circumstances, we are not disposed to modify the long-established principal of sovereign immunity. (emphasis supplied).

If the decision at issue here were upheld, and became the law of the land, it would place any entity dealing with a business owned or operated by an Indian nation at an unequal bargaining position. The Indian business entity would receive only the benefits of the bargain, with none of the risks. Business entities who deal with tribes and tribal nations may know about Indian sovereign immunity, and may require a waiver of it prior to proceeding with any business dealings. However, it is submitted that in many instances, individuals may not even know that they deal with a business that is owned or operated by an Indian Nation. The name "Mt. Adams Furniture" in no way connotes ownership by an Indian Nation. Individuals who unwittingly deal with such entities are the persons who will ultimately be forced to suffer from this decision.

This was also the opinion of the Arizona Supreme Court in *Dixon v. Picopa Const. Co.*, (*Supra*):

> Neither is the Community's self-determination imperiled by our assertion of jurisdiction (denying tribal immunity). This private action based on an off-reservation tort does not in any fashion limit the community's powers nor the power in which it exercises those powers. (citations omitted).
>
> In contrast, *the federal government's policy promoting commercial dealings between Indian tribes and non-Indians is furthered by withholding immunity in this case.* We realize that, here, Dixon did not voluntarily become involved with Picopa, but we believe that an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into a contractual relationship with that Indian corporation or any other Indian corporation. *Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune to suit.* (citations omitted). *This may well retard a tribe's economic growth.* (citations omitted). Further, Congress' provision for allowing Indian tribes to segregate themselves into governmental and commercial corporate units, (citations omitted) arguably implies that "Congress did not intend all commercial activity" undertaken by Indian entities to be immune from suit. (citations omitted). *Thus, Congress itself recognized that immunity may have deleterious effects on a tribe's economic development. Dixon,* (*Supra*), at 1112. (emphasis supplied).

The *Dixon* court emphatically disagrees with the basis for the Ninth Circuit holding in this case, and argues pursuasively that a decision such as this will, in the long run, harm the Indian nations.

CONCLUSION

Based on facts similar to those of the instant case, courts below have arrived at conflicting rulings, based upon different foundations. These matters must be resolved by this Court in order to establish a uniform rule for commercial dealings between Indian tribes and non-Indians.

Wherefore, the Petitioner respectfully prays that a Writ of Certiorari be granted.

DONE AND DATED this 17th day of February, 1993.

U.S. BANKRUPTCY TRUSTEE

By: _____

Ross Richardson
P.O. Box 399
Butte, MT 59703

APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICHARD D. GREENE and DONNA J. GREENE, husband and wife, *Debtors,* ROSS RICHARDSON, Chapter 7, *Trustee-Appellee,* v. MT. ADAMS FURNITURE, *Defendant-Appellant.*	No. 91-35491 D.C. No. CV-90-62-PGH OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
July 8, 1992—Seattle, Washington

Filed November 25, 1992

Before: Arthur L. Alarcon, Pamela Ann Rymer, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson; Concurrence by Judge Rymer

SUMMARY

Civil Litigation and Procedure/Immunity/Jurisdiction/Bankruptcy/Litigation and Procedure (Civil)/Preferential Transfers/Government Law/Native Americans

Reversing and remanding a district court judgment upholding a decision of the bankruptcy court, the court of appeals held that a wholly-owned and operated business of the Yakima Indian Nation located on the Yakima Indian Reservation was immune from suit by a trustee in bankruptcy seeking to set aside as a preferential transfer a commercial transaction between the Indian business and an off-reservation bankruptcy debtor.

Appellant Mt. Adams Furniture, a wholly-owned and operated business of the Yakima Indian Nation with its place of business on the Yakima Indian Reservation in Washington, sold furniture to Richard and Donna Greene in Montana. Mt. Adams subsequently repossessed the furniture for nonpayment. When the Greenes filed for relief under Chapter 7 of the Bankruptcy Code within 90 days, the repossession became a preferential transfer. The trustee in bankruptcy filed an adversarial proceeding against Mt. Adams to set aside the transfer. Mt. Adams objected on the basis of sovereign immunity. The trustee argued that tribal sovereign immunity had been waived under provisions of the Bankruptcy Code. The bankruptcy court rejected Mt. Adams' claim of immunity and entered judgment for the trustee. The district court affirmed.

[1] While the court agreed that the Yakima Nation enjoyed sovereign immunity by reason of its original status as a sovereign, and that a waiver of sovereign immunity could not be implied but had to be unequivocally expressed, that did not decide the issue before the court. **[2]** The court recognized that while the Supreme Court has stated that the doctrine of tribal immunity does not immunize individual members of the

tribe, the Court has not distinguished between tribal immunity off and on the reservation, nor has it had occasion to discuss the immunity of businesses owned and managed directly by the tribe. The court stated that the Supreme Court's failure to distinguish between the tribe's on and off reservation immunity could be argued as at least an implicit recognition that tribal immunity does not disappear at the boundaries of the reservation. **[3]** Thus, in determining whether tribal immunity attached to Mt. Adams in this case, and against the background of nearly two hundred years of recognizing sovereign immunity's extraterritorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity was a compelling, if not controlling, factor. Therefore, the court concluded that since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extraterritorial component. **[4]** Recognizing that the Supreme Court has analyzed tribal sovereignty issues under either a preemption analysis or a dependent status analysis, the court concluded that while the preemption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation, the dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. However, neither was involved when a wholly-owned tribal enterprise doing business on the reservation claimed tribal immunity from a suit that is the result of a private commercial transaction, and the Supreme Court has never stated that either analysis has affected the government's recognition of an Indian tribe possessing the attributes of a common law sovereign. Thus, there was no general impediment to the existence of the immunity claim by the Yakima Nation.

[5] The court next had to determine whether anything in the Bankruptcy Code evidenced an intention to subject the Indian Tribes to bankruptcy court jurisdiction. **[6]** The court rejected

the trustee's assertion that 11 U.S.C. § 106(c) operates as a waiver of the tribe's sovereign immunity. [7] Similarly, the bankruptcy court's jurisdiction over the property of an estate, and its jurisdiction to hear adversary proceedings, did not operate to pierce the Yakima Nation's immunity from suit. Accordingly, the court remanded the matter with instructions to dismiss the adversary proceeding.

Concurring, Judge Rymer agreed that the tribe's sovereign immunity barred this action under either waiver theory argued by the trustee. Judge Rymer stated, however, that because the common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions, whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question.

COUNSEL

R. Wayne Bjur and Tim Weaver, Cockrill, Weaver & Bjur, Yakima, Washington, for the defendant-appellant.

Ross P. Richardson, Henningsen, Vucurovich & Richardson, Butte, Montana, for the trustee-appellee.

OPINION

T.G. NELSON, Circuit Judge:

Mt. Adams Furniture, a wholly-owned and operated business of the Yakima Indian Nation, appeals the district court's rejection of its claim of sovereign immunity in a bankruptcy proceeding imposing a judgment for preferential transfer by

the debtor to Mt. Adams Furniture. We hold that the Yakima Indian Nation is immune from the suit by the trustee and reverse the district court.

FACTS AND PROCEDURAL HISTORY

Mt. Adams Furniture ("Mt. Adams") is a wholly-owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation" or "Yakimas") with its place of business on the Yakima Indian Reservation at Wapato in the State of Washington. Mt. Adams sold furniture to Richard D. and Donna J. Greene (dba Custom Carpets) in Townsend, Montana. The stipulated facts indicate that title to the goods passed to the Greenes, and Mt. Adams had no security interest in the furniture.

Mt. Adams peaceably repossessed the furniture when the Greenes did not pay for it and took it back to Wapato. When the Greenes filed for relief under Chapter 7 of the Bankruptcy Code within ninety days, the repossession became a preferential transfer. Richardson, the trustee, filed an adversary proceeding to set aside the preferential transfer. Mt.Adams appeared, and claimed to be immune from suit. Based on the stipulated facts, the bankruptcy court rejected Mt. Adams' claim of immunity, and directed entry of judgment against Mt. Adams in the amount of $8,779. The bankruptcy court order was affirmed by the district court and this appeal followed.

DISCUSSION

I

[1] The Yakima Nation argues here, as it did in the courts below, that it is a sovereign by reason of its original status as a sovereign (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). It is possessed of "the common-law immunity from suit traditionally enjoyed by sovereign powers, . . . subject to

the superior and plenary control of Congress . . . . [A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes and citations omitted). With these propositions we can, and indeed must, agree. However, they will not readily decide the question before us.

We turn first to the decision of the bankruptcy court affirmed by the district court. The bankruptcy court dealt initially with the question of whether it had to defer to tribal court for determination of the claims involving the Yakima Nation, under *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Since the Yakima Nation did not contend there, or here, that this is a case requiring deference to tribal court but rather argues only that it is entitled to immunity from the suit, we need not discuss the issue of tribal court jurisdiction.

The bankruptcy court also held that Mt. Adams did not enjoy tribal immunity: "Furthermore, the Supreme Court has consistently held that the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses" (citing *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165, 171-73 (1977) (*Puyallup III*)).

If only it were that easy. *Puyallup III* was a review of a judgment entered by the courts of the State of Washington. The state court judgment being reviewed recited that the court had jurisdiction to "regulate the fishing activities of the Tribe both on and off its reservation . . . ." *Id.* at 167. The Supreme Court summarized its holding on the Tribe's claim of sovereign immunity as follows: "We hold that insofar as the claim of sovereign immunity is advanced on behalf of the Tribe, rather than the individual defendants, it is well founded . . . ." *Id.* at 167-68.

[2] Although the Court went on to point out that the doctrine of tribal immunity did not immunize individual members

of the tribe (*id.* at 171-72), it did not distinguish between tribal immunity off and on the reservation. Nor did it have any occasion to discuss immunity of businesses owned and managed directly by the Tribe itself. Therefore, *Puyallup III* not only does not support the bankruptcy court's analysis, the failure of the Supreme Court to distinguish between the Tribe's on and off reservation immunity can be argued as at least an implicit recognition that tribal immunity does not disappear at the boundaries of the reservation.

II

The Mt. Adams business venture involved a commercial business operated directly by the Yakimas for profit purposes, selling furniture to people located off the reservation. The first question then becomes whether tribal immunity attaches to such an enterprise.

Arizona courts have considered the immunity of a "subordinate economic enterprise," which is a tribally-owned and operated business such as Mt. Adams here. The courts of Arizona hold such enterprises to be immune from suit for torts, even when the enterprise operates outside tribal boundaries. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968). This rule was extended to suits based on breach of contract in *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971).[1]

The courts of New Mexico have considered and rejected the Arizona approach. In *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), the Pueblo was doing business as a roofing contractor on off-reservation projects. The New Mexico Supreme Court rejected the Pueblo's claim of immunity, saying:

[1] *See also, North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (en banc) (a tribe does not waive its immunity from garnishment by engaging in commercial activities off the reservation).

> Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity. It is the policy of New Mexico to allow breach of written contract actions against the state. Therefore, we hold that, regardless of where the contract was executed, the district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe.

754 P.2d at 850-51 (internal citation omitted).

The *Padilla* case starts by recognizing the general rule that tribal immunity is immunized from diminution by the states. 745 P.2d at 847 (citing *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986)). It ends by stating, as quoted above, that since no provision has been found which *prohibits* state jurisdiction over tribes for off reservation activities, New Mexico could exercise such jurisdiction as a matter of comity. *Id.* at 850.

At first reading, the New Mexico court seems to have changed hands with the sword. Yet, it started its discussion of tribal immunity with the phrase: "Where a tribe's sovereign immunity obtains . . ." (*id.* at 847), implying that the first inquiry is to determine whether tribal immunity exists in general, although it undertook no analysis of that question.

Tribal immunity has been described as "the common-law immunity from suit traditionally enjoyed by sovereign

powers." *Santa Clara*, 436 U.S. at 58. A necessary first step in the analysis is determining the scope of sovereign immunity at the common law.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the case relied on by *Padilla*, the Supreme Court reviewed sovereign immunity at the common law. It noted there were two concepts involved, "one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* at 414.

As far as the second concept is concerned, the Court determined that immunity of one sovereign in the courts of another was a question answered under the law of the sovereign providing the forum. The Court acknowledged that the extent to which comity would be extended between sovereigns had changed over the years.

> It is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when The Schooner Exchange [11 U.S. 116, 7 Cranch 116, 3 L. Ed. 287] was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts.

Id. at 417.

The question in *Hall* was whether there was a constitutional impediment to California's application of its own law as it existed in 1968, when the accident occurred, or whether it had to apply "the sovereign immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. The Court's discussion of the doctrine as it evolved from the early days of the Republic makes it clear that the states, and the United States, have greatly changed their views of sovereign immunity over the years. In holding there was no Constitutional hindrance to the states' doing so, the Court left the extent of immunity between states to be resolved by the law of those

states. But that discussion also recognized that immunity between sovereigns at the common law was much broader than it is now, particularly as it relates to commercial enterprises.[2]

The Court said in a footnote:

> Such a defense was sustained in 1929 by the Supreme Court of North Dakota in Paulus v. South Dakota, 58 ND 643, 647-649, 227 NW 52, 54-55. The States' practice of waiving sovereign immunity in their own courts is a relatively recent development; it was only last year, for example, that Pennsylvania concluded that the defense would no longer be recognized, at least in certain circumstances, in that State. [citations omitted] But as States have begun to waive their rights to immunity in their own courts, it was only to be expected that the privilege of immunity afforded to other States as a matter of comity would be subject to question.
>
> Similarly, as concern for redress of individual injuries has enhanced, so too have moves toward the reappraisal of the practices of sovereign nations according absolute immunity to foreign sovereigns. The governing rule today, in many nations, is one of restrictive rather than absolute immunity.

Id. at 418, n.13.

Congress reflected the restrictive view of sovereign immunity when it adopted the Foreign Immunities Act of 1976 (28

[2]*See* Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 COLUM. L. REV. 1086 (1965), for a discussion of the development of the restrictive doctrine of sovereign immunity. That doctrine does not recognize sovereign immunity for commercial activities carried on by a foreign state.

U.S.C. § 1602, *et seq.*) The Act specifically eliminated the sovereign immunity of foreign states involved in commercial activity within the United States. [28 U.S.C. § 1605(a)(2)][3]

[3] The actions of the states and the United States in limiting their own immunity, and the action of Congress in limiting the immunity of foreign states underscore the original scope of sovereign immunity. Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

If there were error in the *Padilla* court's analysis, it was in failing to recognize that the scope of tribal immunity in the courts of New Mexico was not wholly a question of New Mexico law. As the *Padilla* court itself noted, "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states." 754 P.2d at 847. Thus, the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.

The issues involved in the *Padilla* case are not before us, and we discuss it here only for the purpose of making the point that the scope of tribal immunity has to be measured at

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[3]From Congress' adoption of the Foreign Immunities Act, we can imply at least two things:

a. It takes an act of Congress to effectively limit the sovereign immunity of a foreign sovereign; and

b. Congress knows how to limit the sovereign immunity of others when it wants to.

the common law as it existed at some earlier time,[4] rather than adopting present limits on sovereign immunity accepted by the states for their own purposes.

Before we leave the question of Yakima Nation's sovereign immunity, we need to look at two lines of Supreme Court cases for possible impact on our analysis. The Court has analyzed tribal sovereignty issues under either a pre-emption analysis or a dependent status analysis. We will examine each of these in turn.

Federal pre-emption was first stated as the basis for resolving issues of state authority over activities on reservations in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973) ("the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"). This approach has been used by the Court in cases involving state efforts to tax activities on the reservation, as in *McClanahan* itself,[5] as well as cases where the state is attempting to regulate activities on the reservation, such as by licensing the sale of liquor,[6] or by applying state statutes regulating bingo.[7]

Almost by definition, application of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation. If there is no attempted state action, there is nothing to be pre-empted. Here, there is no state action proposed, so the pre-emption cases do not affect our analysis.

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[4]Contemporaneously with Senate ratification of the Treaty with the Yakimas in 1859 (12 Stat. 951), the Supreme Court said, "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. . . ." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

[5]*See, e.g., Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[6]*Rice v. Rehner*, 463 U.S. 713 (1983).

[7]*California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).

The other approach the Court has used is to look at the tribe's dependent status and determine how that might affect the tribe's ability to do what it proposes to do. The Court noted in *Washington v. Confederated Tribes*, 447 U.S. 134, 153-54 (1976):

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

The Court said in *United States v. Wheeler*, 435 U.S. at 326:

> Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy . . . . They cannot enter into direct commercial or governmental relations with foreign nations . . . . [T]hey cannot try nonmembers in tribal courts.

(Citations omitted.)

In a general sense, a claim of tribal sovereign immunity involves external relations of the tribe. However, the dependent status of the tribes has been a factor in the analysis of

tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts. An assertion of sovereign immunity is not an affirmative act of the tribe, in the sense involved in the dependent status cases. It is, instead, a claim of status arising from sovereignty itself. Whether for this reason or others, the dependent status analysis has not been used by the Supreme Court in cases involving claims of tribal immunity.

[4] As we analyze this somewhat confusing area of Indian tribal jurisprudence, we conclude that pre-emption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation. The dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. Neither is involved when a wholly-owned tribal enterprise doing business on the reservation claims tribal immunity from a suit which is the result of a private commercial transaction. Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status.

The distinction between tribal sovereignty in general and tribal immunity from suit is reflected in the result in *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. ____, 111 S. Ct. 905, 112 L. Ed. 2d 1112, 1120 (1991). Oklahoma sought to impose its cigarette tax on cigarettes sold by the Tribe in its convenience store located on trust lands. The Court held that Oklahoma could impose its tax on cigarettes sold to non-tribal members, and that the Tribe could be required to collect the tax. *Id.* at 1122. The Court further held that tribal immunity prevented the state from collecting the tax on sales to tribal members and from suing the Tribe to collect amounts due. *Id.* Even though tribal sovereignty did not prevent the state from imposing a duty to collect the tax on

the Tribe, tribal immunity prevented the state from suing to collect the amounts due.

In *Potawatomi*, Oklahoma contended that tribal sovereignty should be limited to tribal courts and the internal affairs of tribal government because "tribal business activities . . . are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context," and because "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws." *Id.* at 1120. In rejecting Oklahoma's argument, the Court said:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development . . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at 1120-21 (citations omitted).

[5] We conclude from the above analysis that sovereign immunity, as it existed at common law, had an extra-territorial component. "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Wold*, 476 U.S. at 891. Congress has not acted to limit the reach of this element of tribal sovereignty, so there is no general impediment to the existence of the immunity claim by the Yakima Nation.

III

We turn now to this specific case. The trustee filed an adversary proceeding against a wholly-owned business of the Yakima Indian Nation. Is there anything in the Bankruptcy Code which evidences an intention to subject Indian tribes to bankruptcy court jurisdiction?

"The trustee is a representative of the estate, not an officer, agent or instrumentality of the United States." *In re Hughes Drilling Co.*, 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987). Thus, the Yakimas' lack of immunity to suit by the United States itself (*United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986); *cert. denied*, 481 U.S. 1069 (1987)) does not render it amenable to suit by the trustee.

The trustee argues that two separate sections of the Bankruptcy Code operate as a waiver of sovereign immunity. The first is 11 U.S.C. § 106:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections(a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> > (1) a provision of this title [11 USCS §§ 101 et seq.] that contains "creditor",

> "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

"Governmental Unit" is defined in section 101(24) as follows:

> "[G]overnmental unit" means United States, State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

[6] Since subsections (a) and (b) relate to situations in which a sovereign has filed a claim in the bankruptcy proceedings, which the Yakima Nation did not, we are left with § 106(c). The Supreme Court has interpreted the effect of § 106(c) in two cases, which compel rejection of the trustee's arguments here.

In *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), the trustee sought a money judgment against a state. Four members of the Court interpreted § 106(c) to authorize only injunctive or declaratory relief against a state because of the language that governmental units are bound by resolution of "issues" rather than "claims." *Id.* at 102. Justice Scalia believed the Congress lacked authority to abrogate the states' immunity to money judgment actions under the Eleventh Amendment, thus making up the majority for its holding that a money judgment could not be obtained against a state under § 106(c). *Id.* at 105.

In the recent case of *United States v. Nordic Village, Inc.*, 501 U.S. ____, 112 S. Ct. 1011, 60 U.S.L.W. 4159 (Feb. 25,

1992), the Court held that § 106(c) did not waive the immunity of the United States to suit for a money judgment. The Court construed § 106(c) as not being an unequivocal waiver of government immunity to suits for money judgments. *Id.* at 1017. For example, § 106(c) would permit the bankruptcy court to bind the government on the amount of the estate's liability for unpaid taxes. *Id.* If we assume, without deciding, that Indian tribes are "governmental units" for the purposes of § 106, then the waiver of sovereign immunity accomplished by § 106 does not extend to actions for money damages against Indian tribes.

Second, the trustee relies on the case of *In re Sandmar Corp.*, 12 B.R. 910, 915 (Bankr. D.N.M. 1981). That court found jurisdiction over the Navajo Nation based in part on the exclusive jurisdiction of the bankruptcy court over the property of the bankrupt estate in a Chapter 11 case, citing 28 U.S.C. § 1471(e). To the extent the trustee here makes a similar argument under 28 U.S.C. § 1334(d),[8] the argument has no merit. In *Nordic Village*, the Supreme Court specifically rejected this contention as it applied to the United States. The Court said:

> In *Blatchford v. Native Village of Noatak*, 501 U.S. ____, ____ (1991) (slip op., at 10), the argument was made that Alaska's Eleventh Amendment immunity to suit was abrogated by 28 U.S.C. § 1362, a jurisdictional grant, akin to § 1334(d), that gives district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . aris[ing] under the Constitution, laws, or treaties of the United States." Rejecting that contention, we observed: "The fact that Congress

[8] 28 U.S.C. § 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of the estate. (Internal citation omitted).

> grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.*, at ____, n.4 (slip op., at 10, n.4).

Nordic Village, 112 S. Ct. 1017 (emphasis in original).

[7] The bankruptcy court's jurisdiction over the property of the estate, and its jurisdiction to hear adversary proceedings, does not operate to pierce the Yakima Nation's immunity from suit.

CONCLUSION

Cases involving tribal sovereignty have usually come up in the context of a conflict between a state's authority and the sovereignty of a tribe. For that reason, we have discussed those cases, even though a claim of state authority is not involved here. Cases which do involve such a claim may well require a different analysis than we have employed, and we do not intend to foreclose any such approach.

There is language in Supreme Court cases, such as *Wheeler*,[9] and *Mescalero Apache Tribe v. Jones*,[10] which raises some question about tribal authority, and perhaps immunity, off the reservation. However, the Court has recently, and emphatically, reaffirmed the validity of the tribal immunity doctrine in *Potawatomi*. Given the Court's demonstrated concern for

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[9]*Wheeler*, 435 U.S. at 326. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

[10]411 U.S. 145, 149 (1973). "But tribal activities conducted outside the reservation present different considerations." *See also Montana v. United States*, 450 U.S. 544, 564 (1981). "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

protecting tribal opportunities for economic development,[11] we believe the Court would hold that tribal immunity does not stop at the reservation boundaries, at least in a case such as this.

REVERSED and REMANDED with instructions to dismiss the adversary proceeding.

RYMER, Circuit Judge, concurring:

I agree with my colleagues that the tribe's sovereign immunity bars this action under either theory argued by the parties — that the bankruptcy court's exclusive jurisdiction abrogates tribal sovereign immunity and that 11 U.S.C. § 106(c) effects a waiver of that immunity. In framing the issues this way, however, both parties assume that the scope of tribal immunity was locked in at the time the treaty with the Yakima Nation was ratified and can only be changed by Congressional action; the immunity enjoyed by other sovereigns, however, is subject to evolution through the common law. As it has evolved, the immunity of a foreign state is limited to its public acts and does not extend to suits based on its commercial or private acts. I write separately to note that we have never squarely addressed the question whether the law on sovereign immunity of an Indian nation is similarly developed. It is not an easy question to resolve, and I am not so persuaded as the majority appears to be that "the scope of tribal immunity has to be measured at the common law as it existed at some earlier time." Since this point was not directly briefed in this case, I do not believe we can answer it authoritatively. I therefore understand the majority's opinion to reach no further than the issues actually raised.

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[11] "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon Band*, 480 U.S. at 219.

As the Supreme Court pointed out in *Nevada v. Hall*, 440 U.S. 410 (1979), the immunity of a sovereign in the courts of another sovereign is controlled by the law of the forum state. *Id.* at 416-17. The old rule of sovereign immunity under United States law was one of absolute immunity. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall stated that the

> perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive a part of that complete territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137. This rule of absolute immunity was followed by the Supreme Court into the twentieth century. *See Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 568 (1926) ("A real sovereign, a state, a nation, is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective.").

Sovereign immunity, like other legal concepts, is capable of evolution. *See Nevada v. Hall*, 440 U.S. at 417-19. Even before the Supreme Court's decision in *Berizzi Brothers*, the State Department had favored the restrictive view, which limits immunity to the noncommercial activities of a foreign sovereign. *See* David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Colum. L. Rev. 1440, 1452 (1983). The Supreme Court implicitly adopted the restrictive view in the early 1940's by agreeing to adhere to the policy opinions of the State Department. In *Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court stated:

> It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

Id. at 35. *See also Ex parte Peru*, 318 U.S. 578, 586-87 (1943); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In 1952, the State Department officially announced in the Tate Letter (letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952)) that it would be "the Department's policy to follow the restrictive theory of sovereign immunity." *Id.*

By enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. 94-582, 90 Stat. 2891 (1976), Congress adopted the restrictive view of sovereign immunity. The House of Representatives report on the FSIA stated that

> the bill would codify the so-called "restrictive" principle of sovereign immunity, *as presently recognized in international law*. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

House Report (Judiciary Committee) No. 94-1487 (Sept. 9, 1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (emphasis added). Since the enactment of the FSIA, the scope of the commercial exception that it codifies has been extensively litigated in the federal courts. *See, e.g., Republic of Argentina v. Weltover, Inc.*, ___ U.S. ___, 112 S. Ct. 2160 (1992) (breach of contract action involving bonds issued by Argentine national bank); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (tort action against Mexican state airline).

The common law sovereign immunity among the states has also evolved. In *Nevada v. Hall*, a California resident had sued the State of Nevada in California court to recover dam-

ages arising from an automobile accident with an employee of the University of Nevada. 440 U.S. at 419. The Supreme Court upheld the California court's rejection of Nevada's sovereign immunity defense, even though it noted that "when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts." *Hall*, 440 U.S. at 417.

Tribal sovereign immunity, such as that asserted by the Yakimas in this case, is not precisely the same as either international law sovereign immunity or sovereign immunity among the states:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323 (1978). Indian sovereignty is further distinguished because of the importance, as the Supreme Court has emphasized, of "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.' " *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. ___, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112 (1991).

Yet the common law sovereignty of Indian tribes is not absolute. The *Wheeler* Court identified several areas in which tribal sovereignty has been circumscribed: Indians can no longer freely alienate the land they occupy to non-Indians, they cannot enter into direct relations with foreign nations, and they cannot try nonmembers in tribal courts. *See* 435 U.S. at 326. At the same time, "Indian tribes have long been recog-

nized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Because that common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions, whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question.[1]

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[1]No other court has directly confronted this question, either. Two recent opinions in other circuits have touched on the commercial exception recognized in the FSIA and commercial transactions of an Indian tribe. Neither, however, explicitly considers whether tribal sovereign immunity extends to commercial activities or is restricted by virtue of a tribe's dependent status or by virtue of evolution of the common law. In *Bank of Oklahoma v. Muscogee (Creek) Nation*, 1992 U.S. App. LEXIS 18593 (10th Cir. 1992), the Tenth Circuit found unpersuasive an analogy to the commercial exception in the FSIA in deciding that an interpleader action filed against an Indian tribe in connection with a dispute over a tribal bingo hall was barred by sovereign immunity. The Eighth Circuit held in *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), that the commercial nature of a loan between a credit union and an Indian tribe did not effect an implied waiver of tribal sovereign immunity. *Id.* at 1378.

As Judge Nelson notes, state supreme courts have addressed the commercial exception, but with ambiguous results. *See, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), *cert. denied*, 490 U.S. 1029, 1030 (1989). *See also Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation."); *Atkinson v. Haldane*, 569 P.2d 151, 169-70 (Alaska 1977) (courts do not recognize "proprietary act/governmental function" test re tribal sovereign immunity); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 939, 942-43 (no commercial exception under existing law, but

concurring justice suggests this rule is "unjust, unwise and unreasonable") (Wash. 1979).

Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *see Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (quoting *United States Fidelity & Guaranty*, 309 U.S. at 512), it has never directly considered the reach of tribal immunity in business ventures. Indeed, Justice White dissented from the denial of certiorari in *Padilla*, 490 U.S. at 1030, urging that the Court should have heard the case "to resolve the conflict among the state courts"; and Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activities off the reservation." *Id.*, 111 S. Ct. at 912 (citing the Foreign Sovereign Immunities Act).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BUTTE DIVISION

IN RE:

RICHARD D. GREENE and DONNA J. GREENE, husband and wife,

Debtors.

ROSS RICHARDSON, Chapter 7 Trustee,

Plaintiff, No. CV-90-062-BU

vs.

MT. ADAMS FURNITURE, ORDER

Defendant.

Mt. Adams Furniture, hereinafter referred to as appellant, instituted the above-entitled action seeking judicial review of an August 10, 1990, decision by the United States Bankruptcy Court for the District of Montana. Jurisdiction vests with this court pursuant TO 28 U.S.C. Section 158. On appeal, appellant's sole argument is that the bankruptcy court lacked jurisdiction over appellant, given the fact that

entity is a wholly owned and managed enterprise of the Confederated Tribes and Bands of Yakima Indian Nation. The court is unpersuaded by appellant's argument in support of its position. After reviewing the entire record, the court is compelled to conclude the bankruptcy court's order dated August 10, 1990, was not in error. In this court's opinion, said order was well reasoned and appellant has simply failed to present a cogent argument to the contrary. Accordingly,

IT IS HEREBY ORDERED that the August 10, 1990, order of the United States Bankruptcy Court for the District of Montana is hereby AFFIRMED.

DATED this 26th day of February, 1991.

/s/ Paul G. Hatfield, Chief Judge
United States District Court

APPENDIX C

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MONTANA

In re

RICHARD D. GREENE, and
DONNA JEAN GREENE,

Case No. 89-20544-007

Debtors.

ROSS RICHARDSON,

Plaintiff,

-vs-

Adversary Proceeding
No. 90/0023

MT. ADAMS FURNITURE,
Defendant.

ORDER

At Butte in said District this 10th day of August, 1990.

In this adversary proceeding, a Complaint to Set Aside a Preferential Transfer was filed by the Plaintiff/Trustee on February 6, 1990. The Defendant filed an Answer admitting the majority of allegations set forth in the Complaint, buy denying that this Court had jurisdiction to hear the matter. The Defendant grounds its jurisdiction claim on the fact that it is a wholly owned and managed enterprise of this Confederated Tribes and Bands of the Yakima Indian Nation (Tribe).

As such, the Tribe asserts that it is immune from suit based on its sovereignty as a recognized tribe. The parties have submitted Stipulated Facts and have filed simultaneous Briefs on this matter. The parties concede that the Plaintiff/Trustee's preference Complaint has merit. The sole issue before the Court is whether the Court has jurisdiction over the Defendant. If this Court finds jurisdiction, then the Plaintiff/Trustee will avail on the Complaint. As a general rule, Indian tribes are immune from suit in state or federal court. *Montana v. U.S.*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1676, 56 L.Ed. 2d 106 (1978); *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165. 171-73, 97 S.Ct. 2616, 2620-21, 53 L.Ed. 2d 677 (1977) [Puyallup III]; *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). In fact, a "[P]etitioner must exhaust available tribal remedies before instituting suit in federal court. . ." *Iowa Mutual life Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S.Ct. 971, 978, 94 L.Ed. 2d 10 (1987), following *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985). The "exhaustion rule" set forth in *Crow Tribe* and *LaPlante* is inapplicable to the present facts. Despite the strong language in *LaPlante* indicating that tribal courts have unlimited civil jurisdiction, this jurisdiction does not extend to bankruptcy proceedings. *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating*, 84 B.R. 638, 641 (D.S.D. 1988), referring to *LaPlante* at 107 S.Ct. 976. Jurisdiction of tribal courts is unlimited only as to matters of self-government. *U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13, 60 S.Ct. 653, 656 85 L.Ed. 894 (1940); *Turner v. U.S.*, 248 U.S. 354, 357-58, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919). As the district court in *Lower Brule* states:

> "Requiring tribal courts to perform as bankruptcy courts by requiring the tribal court to administer a debtor's estate would not promote self-government among the Indian tribes, even assuming that a body of "bankruptcy" law existed in tribal court. Thus, Indian tribal courts have

neither exclusive nor concurrent jurisdiction to hear bankruptcy proceedings. Because application of the exhaustion rule to cases filed in bankruptcy court would not serve the interest of community or judicial economy and would be an exercise in futility, the Court holds that the exhaustion rule of *Crow Tribe* and *LaPlante* does not apply to adversary proceedings in bankruptcy.

This result is analogous to the holding of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*. In that case, the Court decided that tribal courts do not have jurisdiction to prosecute non-Indians for criminal offenses. 435 U.S. 191, 212, 98 S.Ct. 1011, 1022, 55 L.Ed. 2d 209 (1978). In reaching this result, the Court noted that there are 'inherent limitations on tribal powers.' 435 U.S. at 209, 98 S.Ct. at 1021. In the absence of authorization from Congress for asserting such jurisdiction, the powers of the tribe must yield in keeping with the principle that the tribe must forfeit "full sovereignty in return for the protection of the United States." 435 U.S. at 211, 98 S.Ct. at 1022. The protection of non-Indian debtors by operation of the automatic stay of section 362 of the Bankruptcy Code must similarly figure into the equation, limiting the sovereignty of Indian tribes to assert jurisdiction over bankruptcy proceedings." 84 B.R. 641-42.

Numerous other bankruptcy courts, including this one, have held that bankruptcy courts have jurisdiction over Indian tribes. See, e.g., *In re Sandmar Corp.*, 12 B.R. 910 (Bankr. N.M. 1981); *In re Shape*, 25 B.R. 356 (1982); *In re Colegrove*, 9 B.R. 337 (Bankr. N.D. Cal. 1981). *Contra*; *C & R Wyoming Corp. v. Northern Arapaho Tribe, et al.*, Cause No. C89-0105 (D. Wyo. September 12, 1989).

By providing U.S. District Courts with original jurisdiction of all civil proceedings arising under Title 11, Congress has implied that U.S. District courts, rather than tribal courts, should administer bankruptcy estates and any actions arising under them. *Lower Brule*, at 643. Furthermore, the

Supreme Court has consistently held that the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses. See, *Puyallup III*, at 171-73, 97 S.Ct. at 2620-2621.

Accordingly,

IT IS ORDERED that the Defendant is subject to this Court's jurisdiction.

IT IS FURTHER ORDERED that the Plaintiff/Trustee have and recover judgment against the Defendant for $8,779.00.

/s/ JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, Montana 59703

APPENDIX D

III. STATUTORY AUTHORITY

A. 28 U.S.C. Section 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining form hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such sec-

tion applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

B. 28 U.S.C. Section 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

. . . . . .

(E) order to turn over property of the estate;

. . . . . .

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

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11 U.S.C. Section 106:

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that

arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title [11 USCS Sections et seq.] that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

"Governmental Unit" is defined in section 101(24) as follows:

"[G]overnmental unit" means United States, State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.